**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)**

**Case No.** EA/2011/0149

**GENERAL REGULATORY CHAMBER**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Decision Notice No: FS50376688**
**Dated: 5 July 2011**

**BETWEEN:**

**Appellant:** John Seiden

**Respondent:** Information Commissioner

Application to strike out

Decision date: 30th September 2011

Before:

**DAVID MARKS QC**
**SITTING AS A SINGLE TRIBUNAL JUDGE**

Subject matter: Section 40 Freedom of Information Act (Data Protection)

Decision on application to strike out by Information Commissioner

## DECISION

The Tribunal grants the Information Commissioner's request to strike out the present appeal presented under a notice of appeal dated 15 July 2011.

REASONS FOR DECISION

1. This is an application by the Information Commissioner (the Commissioner) to strike out the notice of appeal filed by the Appellant herein and dated 15 July 2011. The application is made under Rule 8(3)(c) of the relevant Tribunal Rules, ie the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 in particular Rule 8 which in relevant part provides as follows by sub rule (3):

> "The Tribunal may strike out the whole or any part of the proceedings if
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> ***
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

2. The rules also provide that no strike out should occur unless the Appellant has been given an opportunity to make representations in relation to the proposed striking out. This the Appellant has done in the present case.

3. The factual background is that a named individual who need not be further identified underwent a marriage ceremony with the Appellant many years ago. The Appellant has continued to maintain that he has never been married to the said named individual. In 2006 the High Court apparently made an order requiring the Home Office to disclose to the Appellant's solicitors certain information about the named individual. That order required the Home Office to provide to the Appellant's solicitors all documents in relation to the named individual's application for entry clearance into the United Kingdom and in relation to a work permit in or about July 1973 as well as all documents in relation to her application for British citizenship in or about 1990.

4. According to the Commissioner the Appellant has sought information on this matter it seems on a number of occasions. He has involved his

MP in this matter and for further information the same can be extracted from the contents of the relevant decision notice which is a publicly available document.

5. On 15 July 2011 the Appellant himself wrote to the Home Office as the relevant public authority asking for information about the named individual. He received no response and resent his request on 23 February and 27 March 2011. The relevant part of the Home Office being the UK Border Agency responded to the request on 30 March. The said Agency (UKBA) told the Appellant that the information he wanted about the named individual was exempt from disclosure under section 40(2) of the Freedom of Information Act (2005) (FOIA) since the disclosure of any information about another individual would breach at least one of the data protection principles. The terms of section 40(2) need not be set out in full. As will be seen below there was a later change such that reliance later came to be placed on section 40(5) In short that sub section provides that there is no duty to confirm or deny in relation to information which would be exempt if it were data protection related and disclosure of any such personal data would breach any of the so called data protection principles or section 10 of the Data Protection Act (DPA). The full terms of the relevant section are set out in an appendix to the decision notice.

6. The Commissioner then embarked on an investigation into the matter and corresponded with the relevant public authority in the name of the Home Office to establish what are called in the Commissioner's response to the notice of appeal the "parameters of the request" for the information and the Commissioner's investigation. The upshot of this is that the Commissioner considered that what the Appellant was really requesting was broader than the terms of his original request on 15 February 2011. The Commissioner therefore proposed to the Home Office and the Appellant to rephrase that request as being for: "all information held by the Home Office and its various agencies and

departments concerning [name removed]", the latter being a reference to the named individual.

7. Pausing here it is clear that this is the basis on which the notice of appeal has been issued by the Appellant. There is simply no argument but that the terms of the request in its rephrased form relates to the person referred to above as the named individual.

8. In his decision notice the Commissioner set out his reasons for finding that the correct exemption was indeed section 40(5)(b)(i). The two principal grounds for so finding were first that the information related to a specific individual such that if the public authority were to confirm or deny whether it held any information about that person or indeed with regard to any of that person's aliases stemming from the fact that various identities had apparently been used, that would amount to a disclosure of personal data. Furthermore any such confirmation or denial as to whether the information was held would not be consistent with the data protection principles.

9. The grounds of appeal set out four grounds which have been usefully collated in an annotated version which accompanies the response by the Commissioner to the original notice of appeal. The four grounds are the following ones.

10. First it is claimed that since the Home Office did not rely on section 40(5)(b)(i) but on section 40(2) the Home Office should disclose any information it may hold about the named individual.

11. The second ground is that passports are often required as proof of identity. Consequently, the information requested by the Appellant can be said to be in the public domain. It follows that the Commissioner was wrong to find that the Home Office need not confirm or deny whether it held the information requested.

12. The third ground reverts to the reference to the court order mentioned above said to be in place requiring the information to be given to the Appellant.

13. The fourth ground is that the Home Office holds incorrect information about the Appellant and therefore has disseminated incorrect information to the public.

14. With regard to the first ground the Tribunal respectfully agrees with the Commissioner that there is nothing in FOIA which prevents a public authority from relying upon an exemption at a later or subsequent stage. Indeed the matter has been subject to recent case law in the Upper Tribunal and the relevant references are given in the Commissioner's response being [2011] UK UT 39(ASE) as well as [2011] UK UT 17(AAC). This ground therefore automatically falls away since decisions of the Upper Tribunal are binding upon the First Tier Tribunal quite apart from the fact that in principle there is no objection to an exemption properly claimed being lodged at a later stage save perhaps in the most exceptional circumstances.

15. With regard to the second ground it is claimed by the Appellant that the information in question is already in the public domain for the reasons stated above. Again with respect the Tribunal agrees with the Commissioner. It is one thing for passports to be requested and indeed for it to be inferred from the said procedure that people are required to prove their identity. It is however quite different to extrapolate from that , that the information contained in or on a passport is therefore as a result of the said process in the public domain or otherwise capable of being discussed and/or examined freely by the general public. That ground of appeal also fails.

16. With regard to the third ground the provision of a court order is of no importance at all with regard to a specific and independent request being made under FOIA. In general terms it is quite right as the Commissioner contends that any FOIA request must be considered

without regard to the motive behind the request although there are exceptional cases where this may not be the case. This case, however, is not one of them. In other words a public authority must ignore the particular circumstances surrounding the request made by the particular requestor and should consider answering the FOIA request on its merits with regard to the relevant exemption or exemptions should the same apply as if the response were to a request made such as to elicit a response to all the world.

17. It therefore follows that the presence of a court order cannot affect the proper manner in which a FOIA request is to be answered and determined and thereafter if necessary adjudicated upon by the Commissioner or by this Tribunal.

18. For those reasons the third ground also fails.

19. Finally, with regard to the fourth ground the Commissioner and this Tribunal is restricted by the terms of the relevant Act of Parliament itself which controls his and its activities in considering the request and the manner in which the request was answered. As the Commissioner again points out should the Home Office hold any information about the Appellant the Appellant's rights would be governed by the DPA not FOIA. There is simply no power as a matter of statute existing within the Tribunal let alone held by the Commissioner to consider an individual's concerns about his or her own personal data.

20. It appears that in a letter between the public authority, namely the Home Office and the Appellant dated 27 May 2011 the Home Office gave the Appellant some information about how to make what is called a "subject access request" to obtain any information which the Home Office might otherwise hold about him should he wished to do so. Reference can be made in this regard to paragraph 42 of the decision notice. It is not clear, at least according to the Commissioner whether and if so, to what extent the Appellant has gone on to make such a request.

21. It follows, necessarily that this ground of appeal should also fail.

22. The Appellant has lodged a lengthy response to the Commissioner's response.

23. In section 4 and following what is said to be "the legislative framework" is set out. There is nothing in the Tribunal's view which impinges upon any of the grounds of appeal or more importantly upon the reasons for rejecting the same proposed by the Commissioner. Much of this section finds expression, if it finds expression at all, in the fourth ground referred to above. In paragraphs 17 to 19 inclusive the Appellant purports to set out the "factual background to this appeal". The same allegation as is made in the previous section of the same response, namely that the Commissioner has failed to carry out a proper fact finding investigation is repeated. This does not bear in any way upon either the grounds of appeal which were first articulated in the notice of appeal and then addressed by the Commissioner's response nor does it assist in answering or dealing with any of the Commissioner's submissions with regard to the four grounds in question. The basic complaint is that neither the public authority nor the Commissioner has contacted or attempted to contact what appears to be the named individual. This is of no relevance whatsoever with regard to any of grounds advanced on this appeal.

24. In paragraphs 20-26 much the same allegations are made as are made in the preceding section, namely that there has been an inaccurate or inadequate fact finding exercise with regard to the underlying factual matters which underpin one or more of the grounds of the appeal. The Tribunal again finds nothing of assistance in any material way whatsoever in this section with regard to answering or refuting any of the arguments put forward by the Commissioner in support of the application to strike out each and all of the four grounds of appeal.

25. In the following section of this response the Appellant deals with what he calls "the Commissioner's Decision". The thrust here appears to be

that the exemption under section 40(5)(b)(i) of FOIA does not apply to what is called a “non-entity”. What is said in this section is a combination of allegations: first it is said that there is really no such person as the named individual and further or in the alternative it is said that as a result the data protection principles of the DPA cannot apply to such a “non-entity”.

26. The Tribunal fails to follow the thrust of this part of the response. It can only deal with the request as finally formulated and as addressed by the decision notice and taking into account the grounds of appeal which in turn are addressed to that request and to that notice. Much of what is said in this section is totally irrelevant.

27. In paragraph 33 and following the Appellant eventually turns to the four grounds of appeal which are each addressed in turn by the Commissioner with regard to the striking out application.

28. With regard to ground 1 the Appellant appears to take issue with the fact that there has been a binding legally authority issued by the Upper Tribunal in the way indicated above. This Tribunal is, as a matter of judicial precedent, bound by the findings of the Upper Tribunal and cannot in the circumstances ignore that binding effect.

29. With regard to ground 2 there is nothing propounded by the Appellant which in any way detracts from the force of the submissions made by the Commissioner. Admittedly, it can be debated at some length to what use passports are put but that is far cry from saying that as a general principle the showing of a passport necessarily means that its contents are placed in the public domain.

30. With regard to the third ground the Appellant seeks to claim that a court order means that the information issued as a result of the same is therefore available “to the world”. This is not an answer to the way in which FOIA works with regard to any specific request. Indeed it does not follow either in the way alleged by the Appellant or at all that a court

order necessarily means that information provided as a result thereof necessarily is placed in the public domain.

31. Finally with regard to the fourth ground all the Appellant says is that he seeks personal information with regard to himself in view of the fact that the named individual may be falsely claiming some sort of relationship with the Appellant. That too is not a ground for undermining the arguments propounded by the Commissioner.

32. In conclusion, therefore, the Tribunal respectfully agrees with the Commissioner that this appeal should be struck out for the above reasons.

**David Marks QC**
Tribunal Judge

Dated: 30th September 2011

**Case No. EA/2011/0149**

**IN THE MATTER OF AN APPEAL OF REQUEST**
**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)**
**GENERAL REGULATORY CHAMBER**

**UNDER SECTION 57 OF FREEDOM OF INFORMATION ACT 2000**

**ON APPEAL FROM:**

**The Decision of the Single Tribunal Judge dated 30 September 2011**

**BETWEEN:**

**JOHN SEIDEN**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Before**

**David Marks QC**
**Sitting as a Single Tribunal Judge**

Decision on application for permission to appeal to the Upper Tribunal

## DECISION

The Tribunal, sitting by a Single Tribunal Judge dismisses the application for permission to appeal against the decision to strike out dated 30 September 2011.

## REASONS FOR DECISION

An appeal to the Upper Tribunal lies only on a question of law. If and in so far as the arguments advanced by the application for permission to appeal relate to arguments of fact and opinion, the same are not a proper basis for an appeal. These matters if applicable at all were for the Tribunal acting by a Single Tribunal Judge to determine on the application to strike out subject to the contents of the said ruling to strike out .The said ruling was set out and explained to the standard required by law. Further or in the alternative, the grounds of the application for permission to appeal to the Upper Tribunal are not understood.

**DAVID MARKS QC**

**Tribunal Judge**

**Dated: 24th October 2011**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. GIA/3318/2011**

## THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

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|---|---|
| **Name:** | Mr John Seiden |
| **Tribunal:** | First-tier Tribunal (General Regulatory Chamber) (Information Rights) |
| **Tribunal Case No:** | EA/2011/0149 |
| **Tribunal Venue:** | Not known (paper hearing) |
| **Decision Date:** | 30 September 2011 |

## NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

**I refuse permission to appeal.**

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

## REASONS

*Introduction*

1. I held an oral hearing of this application for permission to appeal at Field House on Monday 23 April 2012 at Field House in London. Mr Seiden was present, representing himself, and I am grateful to him for the considered and courteous way in which he put his submissions, elaborating on his helpful skeleton argument and the supplement thereto.

2. Mr Seiden applies for permission to appeal against the decision of Tribunal Judge Marks QC (EA/2011/0149, dated 30 September 2011). The decision of Judge Marks QC was to grant the Information Commissioner's application to strike out Mr Seiden's appeal to the First-tier Tribunal (FTT, part of the General Regulatory Chamber (GRC)) under rule 8(3)(c) of the Tribunal Procedure (FTT) (GRC) Rules 2009. Mr Seiden's appeal to the FTT had been to challenge the Information Commissioner's decision notice FS50376688.

*The background to this case*

3. There is a long and complex history to the matters which concern Mr Seiden, and which have taken him on a long voyage through the family courts, but I need not rehearse them in great detail here. I can summarise the background thus. Mr Seiden and Ms Fularon went through a Roman Catholic ceremony of marriage in England in November 1991, prior to which the bride had declared that she had not been party to any previous marriage. Mr Seiden subsequently discovered that in fact Ms Fularon had been previously married in the Philippines in January 1971, so suggesting that she may have committed bigamy in 1991.

4. Complex and lengthy proceedings followed in the Principal Registry of the Family Division and the High Court. In January 2006 HH Judge Curl made an Order, directed to various official bodies here and overseas, for the disclosure of certain documents. This Order included a provision requiring the Home Office (or its agencies) to produce all documents relating to entry clearance and/or a work permit in 1973 relating to Ms Fularon and all documents relating to her subsequent application in or about 1990 for British

citizenship. Mr Seiden informed me that the Home Office had neither complied with this Order nor applied to the Court for it to be varied.

5. Mr Seiden also advised me that those family law proceedings had proceeded as far as the Court of Appeal but are now at an end. Indeed, it is a matter of public record that these proceedings resulted in an unsuccessful application by Mr Seiden for permission to appeal a *decree nisi* of nullity by Munby J (as he then was): see *Seiden v Fularon* [2008] EWCA Civ 1548. I note that, on that occasion, Ward LJ expressed the view that notwithstanding Mr Seiden's undoubted grievances, his application was doomed to failure (see [12]). I fear the same applies in the present matter.

6. Mr Seiden advised me that he had repeatedly asked the Home Office to comply with the Order of HH Judge Curl. He said, however, that he had not applied to the Court for enforcement of that Order in any way. Mr Seiden has also produced an e-mail from an FCO official at the Manila embassy, dating from 2007, acknowledging that Ms Fularon may well have committed deception to obtain a UK visa in 1973, but explaining that the relevant embassy files were destroyed many years ago. Mr Seiden subsequently made a request to the Home Office under the Freedom of Information Act 2000 (FOIA) for information held about Ms Fularon (who it seems may have used more than one name). The Home Office (the public authority) withheld the information using section 40(2) of FOIA. Mr Seiden then complained to the Information Commissioner.

7. The Information Commissioner ruled that the public authority should have relied on the exemption in section 40(5)(b)(i), not section 40(2). The core of the Commissioner's reasoning is at paragraph [30] of the decision notice (FS50376688).

8. Following Mr Seiden's detailed grounds of appeal to the FTT, the Information Commissioner lodged an equally detailed response and applied for the notice of appeal to be struck out under rule 8(3)(c). Mr Seiden was given the opportunity to respond in writing to that application, which he did, again in some detail.

9. Tribunal Judge Marks QC then considered the strike out application at a paper hearing, giving full reasons for why he had decided to grant the Commissioner's application for a strike out.

*The Applicant's grounds of appeal as set out in his skeleton argument*

10. Building on the points originally made on his Form UT11, applying for permission to appeal (see further below), Mr Seiden's main arguments fell under the following heads: (i) his application for information had been rephrased by the ICO; (ii) the information in question was required under the 2006 Order by HH Judge Curl; (iii) the request had been supported by Mr Seiden's MP; (iv) Ms Fularon had not withheld her consent to disclosure by the Home Office; (v) the First-tier Tribunal had acted in excess of jurisdiction; (vi) information issued by the Home Office needed to be corrected. I will deal with each of these grounds in turn.

*The application for information had been rephrased by the ICO*

11. Mr Seiden's first argument was that in its decision notice the ICO had rephrased his request for information (at [14]); the FTT had adopted that same approach (at [6] and [7] of the statement of reasons); and that this "moving of the goalposts" was a fundamental flaw in the FTT's approach as it had proceeded on a false premise. I disagree. On any reading of the decision notice, it seems to me the ICO was simply summarising in a convenient way the nature of the request for information, rather than radically altering its substance.

*The information in question was required under the 2006 Order by HH Judge Curl*

12. Mr Seiden's second argument was that the FTT judge fell into error by ignoring the terms of the 2006 Order of HH Judge Curl. It was not for the FTT to decline to comply with an Order of the High Court or to encourage the public authority not to comply. This argument simply will not run. HH Judge Curl's Order was made under the relevant legislation in family proceedings. The ICO's decision notice and the FTT decision were made under FOIA. The terms and considerations of those two sets of legislation are not necessarily the same. If Mr Seiden was unhappy with the Home Office's failure to comply with the 2006 Order, as he plainly was, then that was a matter that should have been pursued through the then extant family law proceedings. The issue before Tribunal Judge Marks QC was whether or not to strike out Mr Seiden's appeal under FOIA – it was not an application to enforce the 2006 Order against the Home Office.

*The request had been supported by Mr Seiden's MP*

13. The fact that a request under FOIA has been supported by an MP on behalf of his or her constituent gives it no special weight as a matter of law. There is nothing in this point.

*Ms Fularon had not withheld her consent to disclosure by the Home Office*

14. Ms Fularon is not a party to these proceedings and I have not heard her side of the story. Nor was there any evidence before the FTT about her views of the matter.

*The First-tier Tribunal had acted in excess of jurisdiction*

15. This is really just another way of putting the point dealt with at paragraph [12] above and faces the same problems. The FTT was deciding a strike out under FOIA; it was not purporting to rule on the validity of the 2006 Order by HH Judge Curl in any way, which had been made under different legislation in different proceedings with different parties and subject to different considerations.

*Information issued by the Home Office needed to be corrected*

16. I was unclear as to what information it was that the Home Office had issued that Mr Seiden was arguing was incorrect or misleading. However, insofar as Mr Seiden seemed to be suggesting that the Home Office had issued incorrect information about himself, that is a matter to be dealt with under the data protection legislation and not under FOIA.

*Other arguments*

17. Mr Seiden raised a number of other subsidiary arguments in his oral submissions. However, in my view none of them took him any further forward in the fundamental question of whether he could demonstrate that Tribunal Judge Marks QC had erred in law in his approach to the strike out application made by the ICO.

*The Applicant's grounds of appeal as originally set out on Form UT11*

18. For completeness, I should add that on his original Form UT11 Mr Seiden gave ten reasons for challenging the strike out decision. I will deal with each of these briefly below.

19. *The ICO submitted no documentary evidence, just hearsay:* The hearsay rule does not apply in tribunal proceedings. The issue for Judge Marks QC was simply whether or not Mr Seiden's appeal had any reasonable prospect of success in his appeal to the FTT. The Judge explained clearly why it did not.

20. *Judge Marks QC stated in his reasons that he did not understand:* However, reading the file it is clear that Judge Marks QC was not saying that he did not understand the case. Rather, he was actually saying that he did not understand some of Mr Seiden's submissions, such as the application for permission to appeal, which is a different matter altogether. I am entirely satisfied that the Judge understood the key issues in the case.

21. *In the absence of evidence and understanding the FTT Judge erred in law:* This proposed ground adds nothing to the previous two grounds.

22. *The FTT Judge should have investigated further and sought documentary evidence from the ICO:* The Judge was entitled to decide the application for a strike out on the submissions made to him. Mr Seiden has not persuaded me that there was particular extra evidence which the Judge should have called for before deciding that application.

23. *The FTT Judge should have referred the matter to the Upper Tribunal and for oral hearing:* There is nothing in this point. Only certain types of cases can be referred direct to the Upper Tribunal, with the agreement of both Chamber Presidents, and this case was not so suitable. The FTT is also entitled to deal with a strike out application on the papers if it sees fit and follows the correct procedure under the Rules, as was done here.

24. *The FTT Judge was not a properly constituted tribunal and there was no record of proceedings:* A tribunal need not consist of three members; that is a common misconception. A single judge sitting alone is entitled to deal with a strike out application on the papers, and so there will be no record of proceedings in the way that there is for oral hearings involving live evidence and submissions.

25. *The Upper Tribunal should consider the matter:* This adds nothing to the previous grounds. As it is, the matter has been considered at the oral hearing of this application.

26. *The FTT Judge erred in not applying the burden of proof on the public authority to produce relevant documents:* The issue for the FTT was the strike out application – in determining that application the FTT had to consider the grounds of appeal to the FTT, the ICO's response, and whether Mr Seiden had any reasonable prospect of success. The burden of proof was on the ICO to demonstrate that point, and the Judge explained why he was satisfied that the ICO had proved its point.

26. *The FTT did not apply the correct law or wrongly interpreted the law:* Mr Seiden has not satisfied me that this point is arguable. He has failed to show how the FTT applied the wrong law or incorrectly interpreted the law on strike outs.

27. *The FTT had no evidence or insufficient evidence to support its decision:* This adds nothing to the earlier grounds of appeal.

*Conclusion*

28. There is no arguable error of law in the decision of Tribunal Judge Marks QC to strike out Mr Seiden's appeal to the First-tier Tribunal. It follows that I have no option but to dismiss this application. Mr Seiden pointed out that certain documents with personal data had been released by official bodies under the 2006 Order. That is undoubtedly true; but it does not follow that under FOIA the Home Office were required to confirm or deny that they held other documents. Mr Seiden's grievance with the Home Office should have been resolved through the family proceedings – the FTT explained why his case under FOIA had no reasonable prospects of success.

**(Signed on the original)**

**Nicholas Wikeley**
**Judge of the Upper Tribunal**

**(Dated)** **26 April 2012**